



World Wide Gospel Church of Kenya v Warachi & 2 others (Environment & Land Case 36 of 2021) [2022] KEELC 4826 (KLR) (15 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4826 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 36 OF 2021**

**JG KEMEI, J
SEPTEMBER 15, 2022**

BETWEEN

WORLD WIDE GOSPEL CHURCH OF KENYA APPELLANT

AND

DAVID NJUGUNA WARACHI 1ST RESPONDENT

DAVID CHEGE 2ND RESPONDENT

NAWEL BUSINESS AGENCIES 3RD RESPONDENT

JUDGMENT

1. The appeal arises from the judgement of the trial Court delivered on the 29/4/2021 by Hon PM J A Agonda SPMCC No 156 of 2019 – Ruiru.
2. The Appellant being aggrieved by the Judgement of the trial Court filed a memorandum of appeal raising the following grounds;
 - a. That the learned trial Magistrate erred in fact and in law by failing to correctly apprehend the case before her as pleaded with the result that she drew relevant issues to determination on the basis of which she drew irrelevant issues for determination on the basis of which she proceeded to determine the matter thereby arriving at a wrong decision.
 - b. That the learned trial Magistrate erred in fact and in law in making a finding that the matter in dispute was the ownership of Plot No. 20 within L.R. No. 126 Ruiru/East on the basis of which she proceeded to determine the matter thereby arriving at a wrong decision.
 - c. That the learned trial Magistrate erred in law and in fact in reaching a finding that the Appellant claimed to have purchased the 1st Respondent's Plot No. 20 within L.R. No. 126 Ruiru East (described as the land in dispute or suit land in the impugned Judgment) which finding



was against the Appellant's pleaded case and evidence on record thereby arriving at a wrong decision.

- d. That the learned trial Magistrate erred in fact and in law in making the finding that the case before her was one for compelling titles over Plot No. 20 within L.R. No. 126 Ruiru East when it was abundantly clear from the filed pleadings that the suit related to a claim for trespass to land thereby arriving at a wrong decision.
 - e. That the learned trial Magistrate erred in fact and in law in making a finding that the Appellant and the 1st Respondent bought the same property being Plot No. 20 within L.R. No. 126 Ruiru East from the 2nd Respondent which finding was against the parties' cases as pleaded thereby arriving at a wrong decision.
 - f. That the learned trial Magistrate erred in fact and in law in making a finding that the Appellant acquired the 1st Respondent's Plot No. 20 within L.R. 126 Ruiru East through fraud which finding was extraneous to and against the case as pleaded thereby arriving at a wrong decision.
 - g. That the trial Magistrate erred in fact and in law in making a finding that the Appellant did not file its list and bundle of documents dated 8/12/2020 yet the same was duly filed on 9/12/2020 and the said documents produced during hearing.
 - h. That the learned Magistrate erred in fact and in law by not availing to herself the opportunity to examine the Appellant's documentary evidence as per its list and bundle of documents dated 8/12/2020 and filed on 9/12/2020 once she discovered that the same were not on Court record despite being produced and referred to extensively during hearing.
 - i. That the learned trial Magistrate erred in law and in fact by failing to apply the principles of law relating to trespass of land and the ingredients necessary to establish such a claim thereby arriving at a wrong decision.
 - j. That the learned trial Magistrate erred in fact and in law by allowing the 1st Respondent's claim which was against the weight of evidence on record.
 - k. That the learned trial Magistrate erred in fact and in law in making orders not sought for in the Plaintiff.
 - l. That the learned trial Magistrate erred in fact and in law in making orders that were unenforceable.
3. The Appellant sought the following orders;
- a. That the Appeal be allowed.
 - b. That the Judgment delivered on 29/4/2021 by the Hon. J. A. Agonda, Principal Magistrate, in Ruiru CM – ELC No. 156 of 2019 David Njuguna Warachi vs. David Chege, World Wide Gospel Church of Kenya & Nowel Business Agencies be and is hereby set aside.
 - c. That Ruiru CM – ELC No. 156 of 2019 David Njuguna Warachi vs. David Chege, World Wide Gospel Church of Kenya & Nowel Business Agencies be and is hereby dismissed with costs to the Appellant.
 - d. That the costs of this Appeal be awarded to the Appellant.
4. The background of the appeal is that the Respondent filed suit on the 24/10/2017 seeking the following orders;



- a. A declaration that the Plaintiff is entitled to the exclusive and unimpeded right of possession and occupation of the suit land.
 - b. A declaration that the 2nd Defendant whether by himself or his servants or agents or otherwise howsoever is wrongly in occupation of the suit land and is accordingly a trespasser on the same
 - c. A declaration that the 2nd Defendant whether by himself or his servants or agents or otherwise howsoever is not entitled to remain on the suit property.
 - d. A permanent injunction restraining the Defendants whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit land or selling the same.
 - e. An order that the 2nd Defendant immediately vacates the suit property.
 - f. General damages for trespass.
 - g. Costs of the suit.
5. According to the record the 1st and 3rd Defendants failed to enter appearance nor file a defence and judgement in default was entered against them. Their case in the trial Court therefore remained undefended.
 6. Vide an amended defence filed on the 20/12/2018 the 2nd Defendant denied the Plaintiffs claim and contended that it owns plot No 21 which is adjacent to the Plaintiffs plot and denied any encroachment on the suit land and urged the dismissal of the suit.
 7. The trial Court heard the case and entered Judgment in favour of the Plaintiff on the 29/4/2021. This is the judgement that has triggered this appeal.
 8. On the 9/3/2022 the parties elected to canvass the appeal by way of written submissions. By the time of writing this judgement it is only the Appellant that complied with the directions of the Court with respect to filing of submissions.

The submissions

9. The firm of Messrs Mutua Waweru filed written submissions on behalf of the Appellant. The Appellant summarised the grounds of appeal which I shall consider shortly.
10. The Court was asked to bear in mind its jurisdiction on appeal which is to reconsider the evidence placed on record by the parties before the trial Court relating to the dispute, re-evaluate the same and draw its own conclusions noting that, unlike the trial Court, it did not have the advantage of seeing and hearing the witnesses first hand. See the case of *Peters Vs Sunday Post Limited* (1958) EA 424.
11. Relying on the case of *Galaxy paints Company Limited Vs Falcon Guards Limited* (2000) eKLR it was submitted that a trial Court is enjoined to pronounce judgement in relation to issues that arise from the party's pleadings and not otherwise.
12. It was submitted that the trial Learned Magistrate set out two sets of issues for determination in the judgement which in the opinion of the Appellant was testament that she misapprehended the party's respective cases as pleaded leading to incoherent conclusions in the end. Inter alia it was submitted that the issues framed for determination on page 5 of the judgement did not emanate from the pleadings. For instance the issue of ownership of plot No 20 was not in issue at all. Equally that the manner in which the Appellant acquired its property was not in issue and the conclusions of the trial magistrate with respect to the root of title lacked any legal and factual basis.



13. In shot the Appellant submitted that the Magistrate considered and pronounced herself on issues that were extraneous and unpleaded. Inter alia that fraud was never pleaded nor proved and yet the learned Magistrate went ahead without any plea and considered and made a decision on fraud. Further that the Magistrate misdirected herself in granting reliefs that were not sought by the Respondent at all such as rectification of title. That in any event no evidence was adduced to support a position that the plots were registered. That the contrary held sway.
14. With respect to the Appellants bundle of documents it was submitted that the documents were produced and admitted in evidence at the trial and marked as DEX 1-9. The trial Court was faulted for holding that the documents were missing on record. It was the Appellant's submission that the Court disregarded the documents which were on record.
15. With respect to the burden of proof it was the submission of the Appellant that the 1st Respondent did not discharge the burden of proof seeing that the onus was on him to show that the Appellant had encroached parcel 20, the nature and extent of the encroachment. That the decision of the Court that the Appellant ought to grant vacant possession to the 1st Respondent was devoid of any factual basis and urged the Court to so allow the appeal.
16. The issues for determination are;
 - a. whether the 1st Respondent proved trespass on plot No 20;
 - b. whether the Appellant produced its bundle of documents during the trial;
 - c. whether in the opinion of this Court the trial magistrate misapprehended the respective case of the parties as pleaded; considered extraneous and unpleaded issues and matters in arriving at her decision; erred in allowing the claim of the 1st Respondent.
 - d. Whether the appeal is merited
 - e. Who meets the costs of the appeal?
17. I have certainly perused and understood the contents of the pleadings, proceedings, Judgment, grounds of appeal, submissions and the decisions referred to by the parties. Before I deal with the main issue I will generally look at the role of the Court on appeal as well as the burden and standard of proof in civil cases.

The duty of the Court

18. It is the duty of the Court being the first appeal to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.
19. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”



20. The jurisdiction of the Court on appeal was set out in the case of *Peters v Sunday Post Ltd* [1958] EA 424, where the Court held that;

“It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate Court might itself have come to a different conclusion.”

21. This duty is codified in Section 78 of the *Civil Procedure Act* as follows:

“... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.”

22. The second principle I wish to discuss is the burden of proof in civil cases. In that regard I shall rely on the provisions of Section 106, 107 and 112 of the *Evidence Act*.

23. In the case of *John Bwire Vs Joram Saidi Wayo & Euliana Nabalayo Sailoki (both suing on behalf of the Estate of Benjamen Wayo)* the Court held that-

“Burden of Proof” is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or “standard” in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. The general rule in civil cases is that the party who has the legal burden also has the evidential burden. If the Plaintiff does not discharge this legal burden, then the Plaintiff’s claim will fail. In civil suits, the Plaintiff bears the burden of proof that the Defendant’s action or inaction caused injury to the Plaintiff, and the Defendant bears the burden of proving an affirmative defense. If the claimant fails to discharge the burden of proof to prove its case, the claim will be dismissed. If, however the claimant does adduce some evidence and discharges the burden of proof so as to prove its own case, it is for the Defendant to adduce evidence to counter that evidence of proof of the alleged facts. If after weighing the evidence in respect of any particular allegation of fact, the Court decides whether the (1) the claimant has proved the fact, (2) the Defendant has proved the fact, or (3) neither party has proved the fact.”

24. In the case of *Mbutia Macharia v Annah Mutua Ndwiga & Another* the Court of Appeal when dealing with the issue of burden of proof observed: -

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burden initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift” to the party who would fail without further evidence?”

25. The case of the 1st Respondent/Plaintiff in the trial Court was that he is the owner of Plot No 20 within Land Ref No 126 Ruiru East having acquired it through purchase from Namwel Business Agencies. He led evidence that on the 22/5/2017 he visited the suit land and found people digging the foundation



- in readiness to construct a house and upon inquiry from the so called ‘intruders’ he was told that they were from the Appellants church.
26. The Appellant’s response to the 1st Respondents claim was that it did not own Plot No 20 and that on the contrary its plot is No 21 having also acquired by way of purchase as evidenced by the agreement of sale dated the 30/4/2016 from David Kimingi Chege (presumably the 1st Defendant).
 27. It is not in dispute that both plots Nos 20 and 21 are subdivisions emanating from LR No 126 Ruiru East.
 28. The Appellant was emphatic that its plot is No 21 and denied any encroachment of plot No 20.
 29. The right to property enjoys constitutional and statutory protections in Kenya. Under the [Land Registration Act](#) Sections 24, 25 and 26 a land owner enjoys a bouquet of rights with respect to a registered title. Such rights are the right to absolute ownership of the land together with all the rights and privileges belonging and appurtenant thereto; the rights are both express and implied.
 30. It is not in dispute that none of the plots are registered in the land Registry but nevertheless the parties have put up their cases as far as ownership and the manner of acquisition and occupation is concerned.
 31. It suffices therefore to state that registration of the land notwithstanding the 1st Respondent too enjoyed the bundle of rights with respect to the ownership and occupation of plot No 20. That there is no contestation. The trial Court was called upon to determine whether there was indeed encroachment of plot 20 by the Appellant. That was the gist of the 1st Respondents case in the trial Court.
 32. The old adage that says he who alleges must prove still holds true in the circumstances of this case. The 1st Respondent having alleged encroachment of his plot had the legal and evidential burden to proof to the required standard of proof obtaining in civil cases which is the preponderance of evidence.
 33. As to whether there was trespass the 1st Respondent stated in evidence as follows;

“I purchased plot No 21 from LR No 126. My plot is not No 21. I have not purchased any map to show my plot in that area. The 2nd Defendants list of documents DEX1-9 shows the subdivision of LR No 126. Plot 20 and 21 are adjacent to each other. The church is on plot 21 and I am on plot 20. The church has encroached my suit land. ... I never went with the surveyor on that land. I confirmed from the seller of the land ... I believe the church erroneously went into my land. That is all.”
 34. In the case of [John Wanyonyi Makokha Vs Donald Wanyama Shirulikha](#) (2014) eKLR it was held that the failure to tender a surveyors report is fatal in a case where a party is seeking to prove encroachment. The 1st Respondent believed that the Appellant had encroached his plot. Going by the above decision of the Court it is not enough to believe. The 1st Respondent had to proof facts which show that the Appellant made an illegal entry into the plot without his consent and authority, the nature of the trespass and the extent and may be the duration of the trespass. The 1st Respondent states that he found people digging on the land but which land was it? I have seen the map produced by the Appellant which helped to show that plot Nos 20 and 21 are adjacent to each to other, that is as far as it could.
 35. The 1st Respondent was under a legal duty to lead cogent evidence to support trespass on his plot. I find that he failed to prove his case and the Hon Magistrate erred in reaching the decision that she did.
 36. With respect to the Appellants list of documents marked as DEX 1-9, I have carefully perused the trial Court record and was not able to sight them. That notwithstanding I note that they were produced and admitted in evidence and marked as DEX 1-9. It is not explained why the documents are not in



the Court file. This state of affairs is not to be encouraged as it erodes the confidence of the Court and compromises the fair administration of justice. I say no more.

37. In the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR which cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd Vs. Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings.” The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

38. I am persuaded by the dictum of Lord Denning in *Jones Vs. National Coal Board* [1957]2 QB 55 when he stated that;

“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”

39. I have read carefully the judgement of the trial Court which when matched with the pleadings and the material placed before her present a very unique scenario. The Hon Learned Magistrate considered evidence that as extraneous such as fraud, rectification of title while none of these had been pleaded; framed two sets of issues and elected to abandon one set and answered one whose foundation did not emanate from the pleadings of the parties. Once the Learned Magistrate deviated from the pleadings she was on a free fall and that explains the off tangent she took from the case and hence the serious misdirection that resulted in the end.

40. Finally I rely in the decision of the Court in *Galaxy Paints Company Limited V. Falcon Guards Limited* Court of Appeal Case Number 219 of 1998 , the Court of Appeal stated that;

“Issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial Court by dint of the aforesaid rules may only pronounce Judgment on the issues arising from the pleadings or such issues as the parties have framed for the Court’s determination.”



41. From the foregoing I am satisfied that there are good reasons to interfere with the decision of the trial magistrate. And so I shall.

Final orders and disposal

42. The appeal has merit. I enter Judgment as follows;

- a. The appeal is allowed.
- b. The judgement delivered on the 29/4/2021 be and is hereby set aside in its entirety.
- c. The suit SPMCC – ELC No 156 of 2019 in the lower Court be and is hereby dismissed with costs to the Appellant.
- d. Costs of this appeal shall be in favour of the Appellant.

43. Orders accordingly

DELIVERED, DATED AND SIGNED AT THIKA THIS 15TH DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mutua for Appellant

Munene for 1st Respondent

2nd and 3rd Respondents – Absent

Court Assistant – Phyllis Mwangi

